UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

CHARLENE LABRIE,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Civil No. 96-220-B***
	)	
JOHN J. CALLAHAN,	***)***	
Acting Commissioner of Social Security,[1]	***)***	
	)	
Defendant	***)***	

REPORT AND RECOMMENDED DECISION[2]

This Supplemental Security Income ("SSI") appeal raises the issues of whether the Commissioner failed to comply with 20 C.F.R. § 416.969a in analyzing the plaintiff's exertional and non-exertional limitations and whether there is substantial evidence in the record to support the Commissioner's finding that the plaintiff is capable of a full range of sedentary work. I recommend that the court affirm the decision of the Commissioner.

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[1] Pursuant to Fed. R. Civ. P. 25(d)(1), Acting Commissioner of Social Security John J. Callahan is substituted as the defendant in this matter.

[2] This action is properly brought under 42 U.S.C. § 1383(c)(3). The Commissioner has admitted that the plaintiff has exhausted her administrative remedies. The case is presented as a request for judicial review by this court pursuant to Local Rule 16.3(a)(2)(A), which requires the plaintiff to rile an itemized statement of the specific errors upon which she seeks reversal of the Commissioner's decision and to complete and file a fact sheet available at the Clerk's Office. Oral argument was held before me on June 23, 1997, pursuant to Local Rule 16.3(a)(2)(C) requiring the parties to set forth at oral argument their respective positions with citations to relevant statutes, regulations, case authority and page references to the administrative record.

In accordance with the Commissioner's sequential evaluation process, 20 C.F.R. § 416.920; *Goodermote v. Secretary of Health & Human Servs.*, 690 F.2d 5, 6 (1st Cir. 1982), the Administrative Law Judge found, in relevant part, that the plaintiff had not engaged in substantial gainful activity since January 1, 1994, Finding 1, Record p.17; that she has problems with her right shoulder and left knee, symptoms of asthma or chronic obstructive pulmonary disease, coronary artery disease, obesity, and chronic gastritis, impairments which are severe but do not meet or equal any of those listed in Appendix 1 to Subpart P, 20 C.F.R. § 404, Finding 2, Record at 17; that her statements concerning her impairments and their impact on her ability to work are "not entirely persuasive," Finding 3, Record at 17; that she has the residual functional capacity to perform sedentary work with limitations excluding lifting her right arm above her head and work environments with smoke or other lung irritants, Finding 4, Record at 18; that she is unable to perform her past relevant work, Finding 5, Record at 18; and that, based on her age, her exertional capacity, her educational background, her work experience, and application of Rule 201.24 of Appendix 2 to Subpart P, 20 C.F.R. § 404 ("the "Grid") as a "framework," the plaintiff was not disabled at any time prior to the Administrative Law Judge's decision on September 1, 1995, Findings 9-10, Record at 18. The Appeals Council declined to review the decision, Record pp. 3-4, making it the final determination of the Commissioner, 20 C.F.R. § 416.1481; *Dupuis v. Secretary of Health & Human Servs*., 869 F.2d 622, 623 (1st Cir. 1989).

The standard of review of the Commissioner's decision is whether the determination made is supported by substantial evidence. 43 U.S.C. § 1383(c)(3); *Manso-Pizarro v. Secretary of Health & Human Servs*., 76 F.3d 15, 16 (1st Cir. 1996). In other words, the determination must be supported by such relevant evidence as a reasonable mind might accept as adequate to support the

conclusions drawn. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Rodriguez v. Secretary of Health & Human Servs*., 647 F.2d 218, 222 (1st Cir. 1981).

The plaintiff asserts that the administrative law judge failed to analyze her exertional and non-exertional limitations properly under 20 C.F.R. § 416.969a, which deals with application of the Grid. Subsection (d) of that regulation provides, in part: "If your impairment(s) and related symptoms, such as pain, affect your ability to meet both the strength and demands of jobs other than the strength demands, we will not directly apply the rules in appendix 2 unless there is a rule that directs a conclusion that you are disabled based upon your strength limitations; otherwise the rules provide a framework to guide our decision." The plaintiff argues that the administrative law judge was using the Grid only as a framework to guide her decision and that testimony from a vocational expert regarding the existence of jobs in the national economy which the plaintiff could perform was required. There is no testimony in the record from a vocational expert, and the plaintiff therefore claims that she is entitled to remand with an order to pay benefits.

The Grid "can only be applied when claimant's non-exertional limitations do not significantly impair claimant's ability to perform at a given exertional level." *Rose v. Shalala*, 34 F.3d 13, 19 (1st Cir. 1994). Although it is not absolutely clear, the administrative law judge appears to have used the Grid only as a framework to guide her decision. She states that the Grid "contains a series of rules which direct a conclusion of either 'disabled' or 'not disabled,'" Record at 17, but she also states that "[a] finding of 'not disabled' may be reached within the framework of Rule 201.24 of the Medical-Vocational Guideline," *id.*, and that "[b]ased on . . . a framework of Rule 201.24, Section 216.969, Tables 1 and 2, it is determined that the claimant is 'not disabled,'" *id.* Finding 9, at 18. Since the term "framework" has a very specific meaning with respect to the Grid, it is fair to

conclude that the administrative law judge used it to indicate that she had found that the plaintiff's non-exertional limitations (concerning raising her right arm and the air quality in her work environment) did not significantly impair her ability to perform work at the sedentary level.[3] This conclusion is reinforced by the specific finding that "the claimant's additional non-exertional limitations do not significantly compromise her ability to perform sedentary work." *Id.* Finding 4, p. 18. The administrative law judge correctly noted that the burden of proof is on the Commissioner at this point in Step 5 of the sequential evaluation process. *Rosado v. Secretary of Health & Human Servs.*, 807 F.2d 292, 294 (1st Cir. 1986).

The case authority cited by the plaintiff does not require the Commissioner to resort to the testimony of a vocational expert in such circumstances. Social Security Ruling 83-14 provides guidance.

> A particular additional exertional or nonexertional limitation may have very little effect on the range of work remaining that an individual can perform. The person, therefore, comes very close to meeting a table rule which directs a conclusion of "Not disabled." On the other hand, an additional exertional or nonexertional limitation may substantially reduce a range of work to the extent that an individual is very close to meeting a

[3] The plaintiff also relies on Social Security Ruling 96-9p, "Determining Capability to Do Other Work -- Implications of a Residual Functional Capacity for Less than a Full Range of Sedentary Work," effective July 2, 1996, reprinted in 52 *West's Social Security Reporting Service* at Ru 42-51 (1997), which provides, in relevant part: "Where there is more than a slight impact on the individual's ability to perform the full range of sedentary work, if the adjudicator finds that the individual is able to do other work, the adjudicator must cite examples of occupations or jobs the individual can do and provide a statement of the incidence of such work in the region where the individual resides or in several regions of the country." The effective date of this ruling is over nine months after the date of the decision in this case but two months befoe the decision of the Appeals Council. Counsel for the commissioner conceded at oral argument that the Ruling should apply to this claim under these circumstances. In any event, there is substantial evidence in the record to support the administrative law judge's conclusion that the impact of the plaintiff's right arm and air quality limitations on her ability to perform a full range of sedentary work is no more than slight. *E.g.*, Record at 48-53 (testimony of medical expert).

> table rule which directs a conclusion of "Disabled."
>
> Use of a vocational resource may be helpful in the evaluation of what appear to be "obvious" types of cases. In more complex situations, the assistance of a vocational resource may be necessary. The publications listed in sections 404.1566 and 416.966 of the regulations will be sufficient for relatively simple issues. In more complex cases, a person or persons with specialized knowledge would be helpful. State agencies may use personnel termed vocational consultants or specialists, or they may purchase the services of vocational evaluation workshops. Vocational experts may testify for this purpose at the hearing and Appeals Council levels. In this PPS, the term vocational specialist (VS) describes all vocational resource personnel.

Social Security Ruling 83-14, reprinted in *West's Social Security Reporting Service* Rulings 1983-1991 (1992) at 45. Under this Ruling, the testimony of a vocational expert is not necessary if the case is "obvious."

Here, the administrative law judge inferably concluded that the limitations concerning reaching above the head with the right hand and avoiding atmospheres irritating to the lungs left the plaintiff very close to the table rule directing a finding of "not disabled." Sedentary work is defined as follows:

> Sedentary work involves lifting no more than 10 pounds at a time and occasionally lifting or carrying articles like docket files, ledgers, and small tools. Although a sedentary job is defined as one which involves sitting, a certain amount of walking and standing is often necessary in carrying out job duties. Jobs are sedentary if walking and standing are required occasionally and other sedentary criteria are met.

20 C.F.R. § 416.967(a). None of these criteria are affected by the inability to reach above the head with the right hand and the need to avoid smoke or lung irritants.

"If a non-strength impairment, even though considered significant, has the effect only of reducing that occupational base marginally, the Grid remains highly relevant and can be relied on exclusively to yield a finding as to disability." *Ortiz v. Secretary of Health & Human Servs.*, 890

F.2d 520, 524 (1st Cir. 1989). Therefore, the administrative law judge's conclusion that the testimony of a vocational expert was not necessary in order to determine that the plaintiff was not disabled, while not explicit, is not incorrect. *Id*. at 525. There is sufficient evidence in the record to support this conclusion.

For the foregoing reasons, I recommend that the Commissioner's decision be **AFFIRMED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated at Portland, Maine this 30th day of June, 1997.

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David M. Cohen
United States Magistrate Judge